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ORIGINAL

No. 90-6861

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a federal prisoner who seeks only money damages for an alleged violation of his constitutional rights by prison officials must, before bringing a Bivens action in federal court, exhaust administrative remedies in the Bureau of Prisons, even though the inmate grievance procedure is inherently inadequate since it bars considerations of tort claims and does not allow for any award of monetary relief.

Parties to the Proceeding Below

Appellant:

John J. McCarthy

Appellees:

Mr. Maddigan
Dr. Perry
Dr. Walter
Dr. Delmuro

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John J. McCarthy petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 914 F.2d 1411, and reprinted at Pet. App. 1a. The unpublished orders of the United States District Court for the District of Kansas dismissing petitioner's action and denying his motion for reconsideration are reprinted at Pet. App. 4a & 6a, respectively.

JURISDICTION

The Tenth Circuit entered judgment on September 20, 1990. On December 7, 1990, Justice White granted petitioner's application for an enlargement of time in which to file the petition for certiorari, to and including January 18, 1991. Pet. App. 15a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution and federal regulations governing administrative remedies available to resolve the grievances of federal prisoners. The Eighth Amendment provides in full, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The relevant Bureau of Prison (BOP) regulations are published at 28 C.F.R. § 542.10 et seq. (1990), and reprinted at Pet. App. 8a-10a.

STATEMENT

This case involves a federal prisoner whose Bivens action against prison officials was dismissed for failure to exhaust administrative remedies. The court of appeals affirmed, holding that the Bureau of Prisons' administrative remedies for handling inmate grievances -- which do not allow for consideration of tort claims and make no provision for monetary awards -- must be

exhausted even by a prisoner who seeks only money damages in a suit alleging a constitutional tort.

Petitioner John J. McCarthy is currently incarcerated in the federal penitentiary at Leavenworth, Kansas. On April 3, 1990, he filed a pro se Bivens action against the prison's hospital administrator (Maddigan), chief psychologist (Perry), and two prison physicians (Walters and Delmuro), alleging that they had abridged his Eighth Amendment rights through deliberate indifference to his serious medical needs.[1] See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioner claimed that in the two months following surgery on his spinal column at a prison hospital, he had suffered from persistent and severe back pain, for which he repeatedly but unsuccessfully sought effective treatment from the defendants. Pet. App. 12a-13a. The pain resulting from his condition, petitioner alleged, had caused him to "persistently stay[] up at all hours of the night" and to "lay on the floor and

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1 Petitioner, who is serving time for a Connecticut conviction and was transferred to the federal system pursuant to 18 U.S.C. § 5003, also alleged a violation of 18 U.S.C. § 4042, which requires the Bureau of Prisons to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042(2). Perhaps because courts have uniformly held that Section 4042(2) provides no private right of action, see, e.g., Chinchello v. Fenton, 805 F.2d 126, 134 (3d Cir. 1986); Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969); Gibson v. Matthews, 715 F. Supp. 181, 188-90 (E.D. Ky. 1989), both the district court and the court of appeals characterized petitioner's complaint as alleging only an Eighth Amendment violation and ruled on this basis. See Pet. App. 1a-2a, 4a.

pull on his legs," which in turn "cause[d] his cellmate to [be] kept up and cause[d] problems between them." Id. at 13a. Construed liberally, McCarthy's complaint further alleged that his pain was exacerbated by his inability "to cope with stress," a psychiatric condition for which he had received treatment in the past. Id. at 12a. Petitioner further alleged that his repeated requests for effective medical treatment were ignored or refused, that Dr. Walters refused to treat him, and that Chief Psychologist Perry "attempted to make a joke of the [w]hole situation and laughed." Id. at 13a. To redress these alleged constitutional violations, McCarthy sought money damages but not declaratory or injunctive relief. Id. at 11a, 12a, 14a.[2] He also requested a jury trial on his claims. Id. at 14a.[3]

In an unpublished order dated April 6, 1990, the district court dismissed McCarthy's action without prejudice on the ground that he had failed to demonstrate that he had exhausted the administrative remedies provided by the Bureau of Prisons, as required in the Tenth Circuit under Brice v. Day, 604 F.2d 664, 666-68 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980). Pet. App. 4a. The district court explained that "the

2 Petitioner requested $100,000 in compensatory, $100,000 in punitive, and $100,000 in "[a]ctual" damages, as well as costs. Pet. App. 14a.

3 Though asserting that his complaint was "exempt [from] the administrative appeals exhaustion doctrine," petitioner noted that he was "[p]resently . . . appealing" but had received no response from the warden to his letter of complaint. Pet. App. 12a & n.1; see also id. at 13a n.2.

administrative remedy process is necessary for the proper and effective handling of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." Ibid. Subsequently, McCarthy moved for relief from judgment under Federal Rule of Civil Procedure 60(b), which the district court denied in an unpublished order dated April 19, 1990. Id. at 6a.

On appeal, the Tenth Circuit affirmed. Pet App. 1a. The court first addressed petitioner's argument that "the law in this circuit is unsettled as to whether exhaustion of administrative remedies is required in a Bivens-type action, where a federal prisoner seeks only money damages to redress an alleged constitutional violation." Id. at 2a (citation omitted). Rejecting petitioner's attempt to distinguish Brice on the grounds that the prisoner there had sought both monetary and injunctive relief, the Tenth Circuit reasoned that Brice's requirement of exhaustion of remedies "is not keyed to the type of relief sought, but to the need for preliminary fact-finding." Ibid.; see also ibid. ("Brice made clear that 'this administrative consideration is not to resolve constitutional issues nor to consider damages,' but simply to develop a factual record to assist the district court in its review.") (citation omitted) (quoting Brice v. Day, 604 F.2d at 667).

The court of appeals next acknowledged that both the Third and Sixth Circuits had ruled that exhaustion was not required for a claim such as petitioner's involving only monetary relief, but the court explicitly declined to follow those out-of-

circuit decisions. Pet. App. 2a (citing Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982)). The court went on to criticize the Third Circuit's "assumption that the courts 'may not take it upon [them]selves to impose a judicially-created exhaustion requirement directed at federal prisoners,'" ibid. (quoting Muhammad v. Carlson, 739 F.2d at 125), reasoning that since "Bivens actions are a 'creation of the judiciary,' it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions," ibid. (citations omitted).

Though agreeing with the Sixth Circuit that "'the administrative apparatus could not award money damages,'" the court of appeals reasoned that "'administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the extent of the damages.'" Ibid. (quoting Goar v. Civiletti, 688 F.2d at 29) (emphasis in original). To further support its ruling, the court of appeals invoked the Fifth Circuit's decision in Hessbrook v. Lennon, 777 F.2d 999 (1985), stating that it had "correctly construed our holding in Brice and declined to adopt the Third and Sixth Circuits' view on this issue." Pet. App. 2a. Finally, the court of appeals explained that "preliminary fact-finding is necessary in this case, as it was in Brice, to determine whether [McCarthy] has a possible Bivens cause of action." Id. at 2a-3a.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the courts of appeals are sharply divided: whether a federal prisoner seeking only money damages in a properly pleaded Bivens action must first exhaust the administrative grievance procedure provided in regulations of the Bureau of Prisons.[4] Because the lower federal courts have been unable to provide a consistent answer to this question, which arises frequently in many federal districts, review in this Court would appear to be warranted. The argument for review becomes compelling when one examines the merits of the decision below. The Tenth Circuit, in requiring exhaustion in this case of administrative remedies that plainly cannot provide the only relief sought -- damages for past constitutional violations -- has ignored the well-established rule that inadequate remedies

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4 Most courts have required federal prisoners seeking injunctive relief under 28 U.S.C. § 1331 -- alone or in combination with monetary relief under Bivens -- to exhaust the BOP's administrative grievance procedure. Those courts have relied on the theory that prospective relief could be obtained through administrative channels. See, e.g., Veteto v. Miller, 794 F.2d 98, 99-100 (3d Cir. 1986); Pyles v. Carlson, 698 F.2d 1131, 1132 (11th Cir. 1983); Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980); Simmat v. Smith, 602 F. Supp. 18, 20 (S.D.N.Y. 1984), aff'd without opinion, 779 F.2d 38 (2d Cir. 1985). But see Abdul-Khabir v. Lichtenberger, 518 F. Supp. 673, 674-75 (E.D. Va. 1981) (mixed claim need not be exhausted). Several courts, in non-prisoner cases, have declared that exhaustion of remedies is inappropriate in a Bivens action. See Sullivan v. Murphy, 478 F.2d 938, 963 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973); Mundy v. Weinberger, 554 F. Supp. 811, 819 (D.D.C. 1982); Panzarella v. Boyle, 406 F. Supp. 787, 794 (D.R.I. 1975).

need not be exhausted. Its reasoning, moreover, is fundamentally inconsistent in several important respects with the very nature of a Bivens action and creates anomalous distinctions between the remedies available to state and federal prisoners alleging identical constitutional violations.[5]

1. As the Tenth Circuit acknowledged, its ruling flatly conflicts with decisions in the Third and Sixth Circuits at the same time that it is consistent with the prevailing rule in the Fifth Circuit. Compare Muhammad v. Carlson, 739 F.2d 122, 125 (3d Cir. 1984) (no exhaustion required) and Goar v. Civiletti, 688 F.2d 27, 29 (6th Cir. 1982) (same) with Hessbrook v. Lennon, 777 F.2d 999, 1003-05 (5th Cir. 1985) (exhaustion required).[6] In other circuits, where the issue has not been definitively resolved, there are conflicts as well. Thus, district courts in the Second, Fourth, and Seventh Circuits have refused to require exhaustion in a context like this one. See Thomas v. United

5 This Court has never addressed the propriety of imposing an exhaustion requirement on persons bringing a cause of action that is conferred directly by the Constitution. Of course, where a federal right has been created by Congress and its vindication made contingent upon resort to an administrative procedure, the exhaustion-of-remedies requirement is founded upon valid separation-of-powers concerns. Similarly, where state administrative or other remedies could obviate the need for federal judicial relief, the exhaustion requirement is based on legitimate federalism concerns. Arguably, these concerns are simply absent in the Bivens context.

6 Numerous decisions in the Third and Sixth Circuits have followed Muhammad and Goar. See, e.g., McKinney v. Bureau of Prisons, 1990 U.S. App. LEXIS 20412 (6th Cir. Nov. 19, 1990); Lyons v. United States Marshals, 840 F.2d 202, 204 (3d Cir. 1988); see also Jihaad v. Carlson, 410 F. Supp. 1132, 1135 (E.D. Mich. 1976).

States Parole Comm'r, 1988 U.S. Dist. LEXIS 6914 (S.D.N.Y. July 12, 1988); Abdul-Khabir v. Lichtenberger, 518 F. Supp. 673, 675 (E.D. Va. 1981) (following the unpublished ruling in Bey v. United States, 660 F.2d 488 (4th Cir. 1981) (per curiam)); Williams v. Jenkins, 1990 U.S. Dist. LEXIS 11110, at *4-5 (N.D. Ill. Aug. 20, 1990); Byrd El v. Hafer, 1990 U.S. Dist. LEXIS 1227 (N.D. Ill. Jan. 31, 1990); Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975); cf. Bony v. Brandenburg, 735 F. Supp. 913, 914 (S.D. Ind. 1990) (declining to dismiss for failure to exhaust) ("[T]his Court is hesitant to rule that exhaustion of administrative remedies is a requirement in [a] Bivens case when the Seventh Circuit has not yet said that it is, and where there is an apparent split in the circuits on the issue."). By contrast, a district court in Oregon recently predicted that the Ninth Circuit would impose an exhaustion requirement and accordingly dismissed the case before it for failure to exhaust. Housley v. Killinger, 747 F. Supp. 1405, 1407 (D. Or. 1990). See also Cooney v. Edwards, 1990 U.S. Dist. LEXIS 16626 (D. Or. Dec. 6, 1990) (same); Frost v. Cadena, 1990 U.S. Dist. LEXIS 7720 (N.D. Cal. May 8, 1990) (exhaustion required in prisoner Bivens action where damages and TRO sought).

As these cases illustrate, the issue of exhaustion in prisoners' Bivens actions arises very frequently, but the federal courts have decided that issue in widely divergent ways. This

Court should therefore resolve this issue by granting review here.[7]

2. On the merits, the Tenth Circuit's ruling here makes little sense. To begin with, exhaustion of the Bureau of Prisons' grievance procedures prior to filing a damages case is a purely futile gesture, because those procedures cannot provide the relief sought. The procedures, codified at 28 C.F.R. §§ 542.10-.16 (1990), allow a federal prisoner to "seek formal review of a complaint which relates to any aspect of his imprisonment," Pet. App. 8a (28 C.F.R. § 542.10), but exclude "tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates," id. at 9a (28 C.F.R. § 542.12). It would thus appear that petitioner's claim of constitutionally tortious conduct by prison medical personnel is categorically excluded from being heard under the regulations. Goar v. Civiletti, 688 F.2d at 29. Moreover, even if the BOP's administrative scheme would have entertained petitioner's claim, it could not have provided the remedy he sought. Petitioner sought only damages. Pet. App. 11a, 12a, 14a. The regulations simply do not authorize

7 There also appears to be a conflict, within the case law requiring exhaustion, over which BOP administrative remedies must be exhausted by a prisoner such as petitioner. Although the decision below suggests that a prisoner must only exhaust the BOP's inmate grievance procedure codified at 28 C.F.R. § 542.10 et seq., see Pet. App. 2a, the Fifth Circuit's Hessbrook decision requires exhaustion in addition of the administrative procedures for handling claims brought under the Federal Tort Claims Act. See infra p. 15 n.11.

a remedy of damages or other monetary relief to a grievant -- as every court to have examined this administrative grievance procedure has concluded. See, e.g., Muhammad v. Carlson, 739 F.2d at 125; Goar v. Civiletti, 688 F.2d at 29; Abdul-Khabir v. Lichtenberger, 518 F. Supp. at 675.

It is of course hornbook law that a party need not exhaust administrative remedies that are wholly inadequate. See, e.g., Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp., 109 S. Ct. 1361, 1375 (1989); Honig v. Doe, 484 U.S. 305, 326-27 (1988); McNeese v. Board of Educ. for Community Unit School Dist. 187, 373 U.S. 668, 670-72 (1963). And this rule is fully applicable where a party seeks monetary relief and the relevant procedures cannot provide it. See, e.g., Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 338 (9th Cir. 1990); Muhammad v. Carlson, 739 F.2d at 124-25; Goar v. Civiletti, 688 F.2d at 28-29. While it may make some sense to require exhaustion of administrative remedies where "the nature of [the] problem [is] an ongoing one that can be addressed in an administrative review proceeding" and which the inmate seeks to correct prospectively, Byrd El v. Hafer, 1990 U.S. Dist. LEXIS 1227, at *3, that rationale does not hold up where the only remedy sought is damages. Indeed, the United States has previously come close to conceding this point.[8]

8 The government's Brief in Opposition in Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980), did not contest the underlying argument that exhaustion of remedies should not be required of a prisoner's claim for money damages under Bivens. Instead, it argued that Brice's complaint -- which alleged an Eighth Amendment violation where a prison was only 10% above capacity, and failed to allege either that Brice's own cell or area was overcrowded or that any of the high-ranking

Several additional factors weigh against requiring petitioner to exhaust the Bureau of Prisons' grievance procedures. First, a Bivens action involves the assertion of a right rooted in the Constitution. Needless to say, prison officials have no special expertise in deciding constitutional issues and, accordingly, there is no reason to defer to or await their judgment on claims like petitioner's. See Califano v. Sanders, 430 U.S. 99, 109 (1977); Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). Nor is this a case, in light of the skeletal investigative procedures in place in the BOP, where exhaustion should be required "in deference to the superior factfinding ability of the relevant administrative agency." Patsy v. Board of Regents, 457 U.S. 496, 506 (1982) (citing McKart v. United States, 395 U.S. 185, 192-96 (1969)). Indeed, since the grievance process starts with the warden, an exhaustion requirement would require a prisoner, in many cases, to submit his claim to the very person he holds responsible for depriving him of his constitutional rights. Cf. Felder v. Casey, 487 U.S. 131, 148-49 (1988) (Wisconsin notice-of-claim statute, in § 1983

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defendants were aware of the challenged conditions -- was properly dismissed for failure to state a claim upon which relief could be granted. No. 79-5739 Br. for the United States in Opp. at 4-6. In fact, in regard to petitioner's claim for "damages for past acts," the Solicitor General wrote: "There thus appears to be little justification for compelling [Brice] to resort to an administrative remedy that is neither designed to adjudicate constitutional damages claims nor empowered to award damages relief." Id. at 4 n.3.

action, "forces [the] injured persons to seek satisfaction from those alleged to have caused the injury in the first place").

Not only are the grievance procedures inherently worthless in a pure damages case, but they also impose significant burdens and risks on those with potentially meritorious Bivens claims. First, they are time-consuming, involving three separate levels of review. After unsuccessfully seeking "informal resolution" of his claim, a prisoner may file a "formal written complaint" with the warden and, if an unsatisfactory response is received, may appeal first to the Regional Director and then to the General Counsel. Pet. App. 9a-10a (28 C.F.R. §§ 542.13(a), 542.13(b), 542.14, 542.15). At each level, moreover, there are very short filing deadlines -- like the requirement of an initial filing within 15 days -- neglect of which might cause a prisoner to forfeit his constitutional claim.[9] See Lewis v. Meyer, 815 F.2d 43, 45 (7th Cir. 1987). At the same time, the amount of time required to pursue all levels of the process might lead to dismissal of a later court action

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9 See Pet. App. 9a (28 C.F.R. § 542.13(b)). These deadlines may be extended where a prisoner "demonstrates a valid reason for delay," such as the prison's failure to provide him with certain requested materials to which he is entitled. Id. at 9a-10a (28 C.F.R. §§ 542.13(b), 542.15, 542.16). Absent such a valid reason, prisoners have twenty days to appeal the warden's decision and thirty days to appeal the Regional Director's decision. Id. at 9a (28 C.F.R. § 542.15).

for failure to satisfy the statute of limitations.[10] See Patsy v. Board of Regents, 457 U.S. at 514 n.17 ("Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, a judicially imposed exhaustion requirement might result in the effective repeal of § 1983.") (citation omitted).

In addition, contrary to the view of the Tenth Circuit, the Bureau's grievance procedure is unlikely to produce a paper record that will aid the district court in evaluating a Bivens claim. First, the regulations do not even require the preparation of a written report containing factual findings. In fact, nothing in the regulations precludes the warden or subsequent prison officials from simply denying a prisoner's claim without explanation. Second, the regulations do not provide for any hearing mechanism nor do they confer on prisoners any of the panoply of rights that would ensure full development of a factual record upon which a court could reasonably rely, including a right to appear before the investigator, call witnesses, be represented by counsel, or retain one's own investigator. Plano v. Baker, 504 F.2d at 598-99. Instead, the regulations create an ex parte, informal investigative procedure that may even, as noted above, be administered by the very person

10 The warden must respond within 15 days to the all but emergency complaints, and the Regional Director and General Counsel each have 30 days to decide appeals. Pet. App. 9a (28 C.F.R. §§ 542.14, 542.15). These time periods may be doubled, however, if they are "insufficient to make an appropriate decision." Ibid. (28 C.F.R. § 542.14).

whom the prisoner is suing. In light of the institutional loyalties of those who administer it, this administrative scheme is "hardly . . . conducive to a truly adjudicatory performance," and credibility judgments made by its participants are entitled to no deference by the district court. Cf. Cleavinger v. Saxner, 474 U.S. 193, 204 (1985). For a federal court to rely wholly on such a record in determining, for example, whether a Bivens claim has any merit, would be an abdication of judicial duty.[11]

11 The Bureau of Prisons' separate administrative procedure for handling prisoner claims brought under the Federal Tort Claims Act (FTCA), see 28 C.F.R. §§ 543.30-543.32 (1990), has no relevance to this case -- as the court of appeals itself appeared to acknowledge. Pet. App. 2a (conceding that relevant BOP administrative apparatus "'could not award money damages'") (quoting Goar v. Civiletti, 688 F.2d at 29); see also Muhammad v. Carlson, 739 F.2d 122, 125 (3d Cir. 1984); Mundy v. Weinberger, 554 F. Supp. 811, 819 (D.D.C. 1982); Patmore v. Carlson, 392 F. Supp. 737, 739 (E.D. Ill. 1975). But see Hessbrook v. Lennon, 777 F.2d 999, 1003-05 (5th Cir. 1985). First, that distinct procedure covers only "administrative claims asserted under the Federal Tort Claims Act . . . ." Id. § 543.30. Second, the FTCA itself provides a remedy against the United States that is separate and distinct from the constitutional Bivens remedy against an official in her personal capacity. Carlson v. Green, 446 U.S. 14, 18-23 (1980). Indeed, Congress recently confirmed the irrelevance of the FTCA and its administrative exhaustion requirement to Bivens claims. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694, 102 Stat. 4564 (codified at 28 U.S.C. § 2679(b)(2)(B)); see also H.R. Rep. No. 700, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5949-50. Moreover, even if a court should sometimes consider whether a prisoner seeking money damages in a Bivens action has also exhausted the Bureau's FTCA claims procedures, that requirement would have no application where, as here, even those additional administrative remedies cannot provide an adequate remedy. Compare Carlson v. Green, 446 U.S. at 21-22 (punitive damages available under Bivens but not FTCA) and 28 C.F.R. § 543.31(f) (1990) (imposing $2500 cap on FTCA damages recoverable) with supra note 2 (petitioner sought $300,000 in damages, including punitive damages). Lastly, it is worth noting that requiring Bivens claimants seeking damages to exhaust FTCA administrative procedures would have the ironic effect of encouraging every prisoner with a Bivens claim to add an FTCA claim to his case.

3. It would be particularly ironic to ignore these practical factors and require exhaustion in a Bivens context since, under Bivens, the existence of an adequate statutory remedy would preclude the implied action for damages altogether. Having authorized Bivens suits in precisely this type of case, see Carlson v. Green, 446 U.S. 14, 18-19 (1980), it would make little sense for this Court also to require exhaustion of an inadequate grievance procedure. To be sure, Congress could do away with Bivens actions for federal prisoners by enacting a comprehensive, or expressly exclusive, remedial scheme in the Bureau of Prisons for handling prisoners' constitutional tort claims. "Were Congress to enact some statutory scheme authorizing the Federal Bureau of Prisons or its equivalent to provide an effective alternative remedy for prisoners asserting constitutional violations," explained Judge Adams in Muhammad v. Carlson, "the implied remedies that Bivens recognized indeed might be unnecessary." 739 F.2d at 124-25. That has not, however, happened. Until it does, federal prisoners retain a Bivens action whose very existence presupposes inadequate administrative remedies. Exhaustion of such remedies should not be required.

Congress could also expressly condition Bivens actions on exhaustion of administrative remedies. But it has not done that either. To the contrary, the best indication of congressional intent in this area is the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e. That provision overrules

the usual principle that exhaustion is not required in Section 1983 cases. Patsy v. Board of Regents, 457 U.S. at 500-12. It does so, however, only where a state prison system sets up a grievance process that meets certain specific standards. To qualify, a state system must offer "plain, speedy, and effective administrative remedies," 42 U.S.C. § 1997e(a)(1), as well as meet five statutory minimum standards, including provision for: (1) an advisory role for inmates and prison employees "in the formulation, implementation, and operation of the system"; (2) "specific maximum time limits for written replies to grievances with reasons thereto at each decision level"; (3) priority processing of emergency grievances; (4) safeguards to avoid reprisals against grievants or other participants in the system; and (5) independent review of the disposition of grievances "by a person or other entity not under the direct supervision or direct control of the institution." 42 U.S.C. § 1997e(b)(2).

The statute further directs the Attorney General to develop a procedure for promptly certifying state systems, and to promulgate regulations and standards governing both the certification process and the criteria for approval. 42 U.S.C. §§ 1997e(b)(1), 1997e(c)(1). Those regulations, currently codified at 28 C.F.R. §§ 40.1 et seq. (1990), impose additional requirements on state administrative systems. See, e.g., 28 C.F.R. § 40.6 (requiring grievance procedure to "afford a successful grievant a meaningful remedy" and stating that "[a]lthough available remedies may vary among institutions, a

reasonable range of meaningful remedies in each institution is necessary"); id. § 40.7(c) (barring inmates or employees who are implicated in subject of grievance from participating "in any capacity in the resolution of the grievance"); id. § 40.7(d) (requiring "[r]easoned, written responses" to grievances).

The Bureau of Prison's inmate grievance procedure falls well short of the CRIPA standards. The federal procedure, by failing to entertain tort claims or to provide any chance of monetary relief, lacks an effective or meaningful remedy for claimants such as petitioner. Neither does the federal system require a reasoned response to grievances, or protection from reprisals for participants in the grievance proceeding, and so on. Thus, under the decision below, a federal prisoner is required to exhaust a remedy that his state counterpart would not have to pursue before seeking to vindicate the very same constitutional rights in federal court.

As this Court recognized in Butz v. Economou, 438 U.S. 478 (1978), in rejecting broader immunity for federal officials than for state officials, "federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." Id. at 501 (emphasis in original). Indeed, "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." Id. at 504. Imposing on Bivens claimants a burdensome and futile exhaustion requirement,

along with its attendant delay, represents a significant burden on the vindication of constitutional rights by federal prisoners not shouldered by their counterparts in the state systems. Such a rule serves no valid interest and, as the CRIPA statute demonstrates, is more likely to frustrate than to vindicate the will of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

lan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1948). However, the application of this doctrine in the case before us does not lead to the construction sought by appellant.

The Ninth Circuit in *Jew Ten v. I.N.S.*, 307 F.2d 832 (1962), considered the same argument as here advanced by the appellant including the impact of the 1956 exclusion of drug offenses. The court there reached the same conclusion as herein expressed—the recommendation provision is applicable only to offenses described in § 1251(a)(4) and no other deportable offenses. *See also Oviawe v. I.N.S.*, 853 F.2d 1428 (7th Cir.1988); *Delgado-Chavez v. I.N.S.*, 765 F.2d 868 (9th Cir.1985).

In *United States v. Gonzales*, 582 F.2d 1162 (7th Cir.1978), the court upheld the trial court's refusal to consider a recommendation where the offense was not within § 1251(a)(4). There the offense was drug related and thus, of course, expressly excluded, but the issue as to whether the recommendation need be considered at all by the trial judge would there be the same as in the case before us as to non-included offenses.

We have quoted above the words of the trial judge at sentencing on this issue, and again, we construe it as a statement that the suggestion that a recommendation be made did not need to be considered on its merits.

AFFIRMED.

John J. McCARTHY, Plaintiff-Appellant,

v.

Mr. MADDIGAN, Dr. Perry; Dr. Walter, Dr. Delmuro, Defendants-Appellees.

No. 90-3112.

United States Court of Appeals, Tenth Circuit.

Sept. 20, 1990.

Inmate brought civil rights action against prison officials, alleging deliberate indifference to a serious medical need. The United States District Court for the District of Kansas, Richard Dean Rogers, J., dismissed claim without prejudice, and subsequently denied inmate's motion for relief from judgment. Inmate appealed. The Court of Appeals, Brorby, Circuit Judge, held that exhaustion of administrative remedies was required in *Bivens*-type action in which prisoner sought only money damages to address alleged violation of Eighth Amendment.

Affirmed.

Administrative Law and Procedure ⇐230
United States ⇐50.20

Exhaustion of administrative remedies was required in *Bivens*-type action in which federal prisoner sought only money damages to redress alleged violation of his Eighth Amendment rights due to prison officials' alleged deliberate indifference to his serious medical needs. 28 U.S.C.A. § 1331; U.S.C.A. Const.Amend. 8.

John J. McCarthy, pro se.

Before McKAY, MOORE, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a)(1); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant John J. McCarthy appeals the district court's dismissal of his civil rights claim filed pursuant to 28 U.S.C. § 1331 and the court's denial of his motion for relief from judgment made pursuant to Fed.R.Civ.P. 60(b). Appellant alleges that the deliberate indifference to his serious medical needs of officials of the federal

penitentiary in Leavenworth, Kansas, violates his Eighth Amendment rights, and he seeks damages. The district court dismissed the claim without prejudice because Mr. McCarthy failed to demonstrate he had made use of the administrative review process provided by the Bureau of Prisons, as required by *Brice v. Day*, 604 F.2d 664, 666–68 (10th Cir.1979), *cert. denied*, 444 U.S. 1086, 100 S.Ct. 1045, 62 L.Ed.2d 772 (1980). District Court Order of April 6, 1990. For the reasons cited in its first order, and because appellant failed to present any new evidence, the district court also denied appellant's motion for relief from judgment. District Court Order of April 19, 1990.

Appellant argues that the law in this circuit is unsettled as to whether exhaustion of administrative remedies is required in a *Bivens*-type action, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), where a federal prisoner seeks only money damages to redress an alleged constitutional violation. He urges us to follow certain cases from the Third and Sixth Circuits rejecting such a requirement.

The appellants in *Brice v. Day* argued, as does Mr. McCarthy, that the exhaustion of administrative remedies requirement does not apply where damages are sought for a violation of a constitutional right. 604 F.2d at 665. One of the appellants in *Brice* sought monetary damages and "what other relief the court deems fair." *Id.* This court held that "preliminary fact-finding would be necessary to determine whether there is a possible *Bivens* cause of action.... Thus, if we assume that the petitions before us could indicate a *Bivens* cause of action as the appellants argue, we must ... require an initial administrative inquiry." *Id.* at 666. *Brice* made clear that "this administrative consideration is not to resolve constitutional issues nor to consider damages," *id.* at 667, but simply to develop a factual record to assist the district court in its review.

Appellant relies principally on *Muhammad v. Carlson*, 739 F.2d 122 (3d Cir.1984), and *Goar v. Civiletti*, 688 F.2d 27 (6th Cir.1982), both of which hold that a federal prisoner seeking only money damages in a *Bivens*-type action need not first exhaust administrative remedies. *Muhammad* and *Goar*, however, do not state the law in this circuit. Moreover, these cases mischaracterize this circuit's holding in *Brice*. According to the Third Circuit, *Brice* held that a "federal prisoner seeking damages and other relief for overcrowded conditions must exhaust administrative remedies." 739 F.2d at 125 n. 1; *cf.* 688 F.2d at 29. The rule of *Brice*, however, is not keyed to the type of relief sought, but to the need for preliminary fact-finding. *Brice* does not except cases involving claims for monetary damages only.

We also disagree with the Third Circuit's assumption that the courts "may not take it upon ourselves to impose a judicially-created exhaustion requirement directed at federal prisoners." 739 at 125. Given that *Bivens* actions are "a creation of the judiciary," *id.* at 124; *accord Brice*, 604 F.2d at 665, it follows that the courts may, and indeed must, establish reasonable requirements for bringing such actions. Furthermore, as the Sixth Circuit recognized in *Goar*, "[a]lthough the administrative apparatus could not award money damages .... administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages." 688 F.2d at 29 (emphasis in original).

We further note that in *Hessbrook v. Lennon*, 777 F.2d 999, 1007 n. 14 (1985), the Fifth Circuit correctly construed our holding in *Brice* and declined to adopt the Third and Sixth Circuits' view on this issue. We agree with the *Hessbrook* panel that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their ... treatment during confinement." 777 F.2d at 1007.

We find no merit in the other cases cited by appellant, Appellant's Opening Brief at 3, nor do they alter our conclusion that preliminary fact-finding is necessary in this case, as it was in *Brice*, to determine

whether appellant has a p
cause of action. *See* 604 F
Hatcher v. Office of Compt
rency, 631 F.2d 985, 989 n. 6
(citing *Brice*). Furthermore
pellant alleged in his complai
invoked the prison grievance
or to filing this suit, he does
on appeal the district court'
he "failed to demonstrate h
[available] administrative rem
Order of April 6, 1990, at 1.

Accordingly, we grant perm
ceed in forma pauperis, and
the district court is AFFIRM

UNITED STATES of A
Plaintiff–Appellee

v.

William Troy BULLOCK a/
Allen Tate, Defendant–Ap

No. 89–7066.

United States Court of A
Tenth Circuit.

Sept. 20, 1990.

Defendant was convicted in
States District Court for the E
trict of Oklahoma, Frank H
Chief Judge, of, inter alia, use o
commission of various drug
crimes. On appeal, the Court
Seth, Circuit Judge, held that:
ment was sufficient, and (2) ev
sufficient to support conviction

Affirmed.

1. Indictment and Information

Though failure of indictme
offense is fatal defect that ma
at any time, countervailing inter
cial efficiency requires that ta

whether appellant has a possible *Bivens* cause of action. *See* 604 F.2d at 666; *cf. Hatcher v. Office of Comptroller of Currency*, 631 F.2d 985, 989 n. 6 (D.C.Cir.1980) (citing *Brice*). Furthermore, although appellant alleged in his complaint that he had invoked the prison grievance procedure prior to filing this suit, he does not challenge on appeal the district court's finding that he "failed to demonstrate his use of the [available] administrative remedy process." Order of April 6, 1990, at 1.

Accordingly, we grant permission to proceed in forma pauperis, and the order of the district court is AFFIRMED.

UNITED STATES of America,
Plaintiff–Appellee,

v.

William Troy BULLOCK a/k/a Larry Allen Tate, Defendant–Appellant.

No. 89–7066.

United States Court of Appeals,
Tenth Circuit.

Sept. 20, 1990.

Defendant was convicted in the United States District Court for the Eastern District of Oklahoma, Frank Howell Seay, Chief Judge, of, inter alia, use of firearm in commission of various drug trafficking crimes. On appeal, the Court of Appeals, Seth, Circuit Judge, held that: (1) indictment was sufficient, and (2) evidence was sufficient to support conviction.

Affirmed.

1. Indictment and Information ⇐117

Though failure of indictment to state offense is fatal defect that may be raised at any time, countervailing interest in judicial efficiency requires that tardily challenged indictments be construed liberally in favor of validity.

2. Weapons ⇐17(1)

Indictment charging defendants with using or carrying firearms "in the commission of the drug trafficking crimes listed" and with assembling collection of weapons to protect and defend drug laboratory, was sufficiently specific and descriptive even though indictment did not quote precise statutory language that use of firearms was during "and in relation to" drug trafficking crimes. 18 U.S.C.A. § 924(c).

3. Indictment and Information ⇐110(2)

Indictment need not quote statutory language to be legally sufficient.

4. Weapons ⇐4

Amendment to statute proscribing use or carrying of firearm during commission of drug trafficking crime, requiring showing that firearm was used "during and in relation to" crime, did not create new element to offense which had to be specifically alleged; instead, amendment refined factor already in statute with no change in meaning of "used" element. 18 U.S.C.A. § 924(c).

5. Weapons ⇐4

Defendant could be convicted for "use" of firearm in commission of drug trafficking crime, though he did not have firearm on his person at time he was arrested; there were guns in virtually every room of defendant's house, with loaded shotgun on bed within a few feet of defendant, and codefendant testified that guns would be used if necessary to protect their drug operation from being "ripped-off." 18 U.S.C.A. § 924(c).

Sheldon J. Sperling, Asst. U.S. Atty. (John Raley, U.S. Atty., with him on the brief), Muskogee, Oklahoma, for plaintiff-appellee.

Gene V. Primomo of Wilcoxen & Wilcoxen, Muskogee, Okl., for defendant-appellant.

U.S. DISTRICT COURT
DISTRICT OF KANSAS

IN THE UNITED STATES DISTRICT COURT APR 6 10 45 AM '90
FOR THE DISTRICT OF KANSAS

BY _____ DEPUTY

JOHN J. McCARTHY,

Plaintiff,

v.

MR. MADDIGAN, et al.,

Defendants.

CASE NO. 90-3101-R

O R D E R

This matter is before the court on a civil rights complaint filed pursuant to 28 U.S.C. § 1331. Plaintiff, a Connecticut prisoner housed at the United States Penitentiary, Leavenworth, Kansas, (USPL), alleges that defendants have demonstrated deliberate indifference to his medical needs in violation of the Eighth Amendment. Plaintiff seeks damages.

The court finds that plaintiff has failed to demonstrate his use of the administrative remedy process provided by the Bureau of Prisons. Use of the administrative remedy process is a prerequisite to federal judicial review. See Lane v. Hansberry, 593 F.2d 648 (5th Cir. 1979); Brice v. Day, 609 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980); Rivera v. Toft, 477 F.2d 535 (10th Cir. 1973). Further, the administrative remedy process is necessary for the proper and effective handing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance. Brice, 604 F.2d at 667.

IT IS THEREFORE ORDERED that this action is hereby dismissed without prejudice. The clerk of the court is directed to transmit a copy of this order to plaintiff.

DATED: This 6th day of April, 1990 at Topeka, Kansas.

/s/ DALE E. SAFFELS
RICHARD D. ROGERS
United States District Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

APR 19 1 59 PM '90

RALPH L. DELOACH,
BY B. [illegible] DEPUTY
AT TOPEKA, KS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN J. McCARTHY,

Plaintiff,

v.

MR. MADDIGAN, et al.,

Defendants.

CASE NO. 90-3101-R

O R D E R

This matter is before the court on plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. Pro. 60(b) and plaintiff's Notice of Appeal, filed simultaneously with this court.

Plaintiff was permitted to proceed in this action in forma pauperis. The action was dismissed without prejudice by this court's Order dated April 6, 1990. Plaintiff has filed a Notice of Appeal from the order of dismissal, and, pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, might appeal in forma pauperis without further authorization in the absence of a certificate prescribed by the second paragraph of that rule.

The court first finds the motion for relief from judgment should be denied. The court dismissed this action without prejudice due to plaintiff's failure to exhaust available administrative remedies. Plaintiff had provided no new evidence, and the arguments made by plaintiff do not persuade the court that its prior ruling should be disturbed.

AO 72A
(Rev. 8/82)

RDR:RL

For the reasons set forth in the Order of April 6, 1990, and because plaintiff makes no allegations on appeal, the court further finds that the appeal is legally frivolous and is not taken in good faith.

IT IS THEREFORE ORDERED that plaintiff's motion for relief from judgment be denied.

IT IS FURTHER ORDERED that plaintiff is hereby denied leave to proceed in forma pauperis on appeal. The clerk of the court is directed to transmit a copy of this order to plaintiff and

DATED: This 19th day of April, 1990, at Topeka, Kansas.

/s/ RICHARD D. ROGERS
RICHARD D. ROGERS
United States District Judge

AO 72A
(Rev. 8/82)

housing and the likely health threat the inmate poses to others by his actions.

(b) The Warden shall serve as the review authority at the institutional level, and shall make a recommendation to the Regional Director when he believes the inmate should be considered for release from controlled housing.

(c) An inmate may appeal a Warden's decision not to recommend release from controlled housing to the Regional Director within five working days of receipt of that decision.

(d) Upon recommendation of the Warden, or upon appeal from the inmate, the Regional Director may decide whether or not to release the inmate to general population from controlled housing status.

(e) An inmate may appeal a decision of the Regional Director, through the Administrative Remedy Procedure, directly to the Program Review Division, Bureau of Prisons within 30 calendar days from the date of the Regional Director's decision.

[54 FR 11323, Mar. 17, 1989; 54 FR 18198, Apr. 27, 1989]

§ 541.68 Release from controlled housing status.

(a) Only the Regional Director may release an inmate from controlled housing status. The following factors are considered in the evaluation of an inmate's readiness for return to the general population:

(1) Relationship with other inmates and staff members, which demonstrate that the inmate is able to function in a less restrictive environment without posing a health threat to others or to the orderly operation of the institution;

(2) Involvement in work and recreational activities and assignments or other programs; and

(3) Adherence to institution guidelines and Bureau of Prisons rules and policy.

(b) An inmate released from a controlled housing status may be returned to the general population of that institution, or to another federal or non-federal institution.

PART 542—ADMINISTRATIVE REMEDY

Subpart A—[Reserved]

Subpart B—Administrative Remedy Procedure for Inmates

Sec.
542.10 Purpose and scope.
542.11 Responsibility.
542.12 Issues improperly filed.
542.13 Initial filing.
542.14 Remedy processing.
542.15 Appeals.
542.16 Index and access.

AUTHORITY: 18 U.S.C. 4001, 4042, 4081, 4082, 5015, 5039; 28 U.S.C. 509; 28 CFR 0.95-0.99.

SOURCE: 44 FR 62250, Oct. 29, 1979, unless otherwise noted.

Subpart A—[Reserved]

Subpart B—Administrative Remedy Procedure for Inmates

§ 542.10 Purpose and scope.

The Bureau of Prisons has established an Administrative Remedy Procedure through which an inmate may seek formal review of a complaint which relates to any aspect of his imprisonment if less formal procedures have not resolved the matter. This procedure applies to all inmates confined in Bureau of Prisons institutions, but does not apply to inmates confined in non-federal facilities.

§ 542.11 Responsibility.

(a) The Warden, Regional Director, and General Counsel are responsible for the operation of the Administrative Remedy Procedure at the institution, regional and central office levels, respectively, and shall:

(1) Establish procedures for receiving, reviewing, investigating and responding to complaints or appeals submitted by an inmate;

(2) Acknowledge receipt of a complaint or appeal by returning to the inmate a signed receipt;

(3) Conduct an investigation into each complaint or appeal;

(4) Respond to and sign all complaints or appeals filed at their level.

This responsibility may not be delegated further.

(b) Inmates have the responsibility to present complaints in good faith and in an honest and straightforward manner.

§ 542.12 Issues improperly filed.

Filings will not be accepted under the Administrative Remedy Procedure for tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates.

§ 542.13 Initial filing.

(a) *Informal resolution.* Inmates shall informally present their complaints to staff, and staff shall attempt to informally resolve any issue before an inmate files a request for Administrative Remedy. The Warden may establish local procedures to ensure that attempts at informal resolution are made.

(b) *Filing.* If an inmate is unable to informally resolve his complaint, he may file a formal written complaint, on the appropriate form, within fifteen (15) calendar days of the date on which the basis of the complaint occurred. Where the inmate demonstrates a valid reason for delay, an extension in filing time shall be allowed. An extension in the time for filing shall be allowed when an inmate indicates and staff verify that a response to the inmate's request for copies of dispositions requested under section 8 of this Program Statement (§ 542.16) has not been received. An inmate may obtain assistance in preparation of his complaint or appeal from other inmates or from institution staff.

(c) *Sensitive complaints.* If the inmate believes the complaint is sensitive and that he would be adversely affected if the complaint became known at the institution, he may file the complaint directly with the Regional Director. The inmate must explain, in writing, the reason for not filing the complaint at the institution. If the Regional Director agrees that the complaint is sensitive, he shall accept and respond to the complaint. If the Regional Director does not agree that the complaint is sensitive, he shall advise the inmate in writing of that determination, without a return of the complaint. The inmate may pursue the matter by filing the complaint locally with the Warden.

(d) *Control Unit Appeals.* Appeals relative to Control Unit placement may be filed directly with the General Counsel.

[44 FR 62250, Oct. 29, 1979, as amended at 44 FR 76726, Dec. 27, 1979]

§ 542.14 Remedy processing.

Response time limits. A complaint or appeal is considered filed when the receipt is issued. Once filed, response shall be made by the Warden within fifteen (15) calendar days, by the Regional Director within thirty (30) calendar days, and by the General Counsel within thirty (30) calendar days. If the complaint is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond within 48 hours of receipt of the complaint. If the period of time for response to a complaint or appeal is insufficient to make an appropriate decision, the time for response may be extended once by the same amount of time as originally allowed for response. Staff shall inform the inmate of this extension in writing. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level. Staff shall, however, respond to all filed complaints.

§ 542.15 Appeals.

Filing. If an inmate is not satisfied with the Warden's response, that response may be appealed on the appropriate form to the Regional Director within twenty (20) calendar days of the date of the Warden's response. If the inmate is not satisfied with the Regional Director's response, that response may be appealed on the appropriate form to the General Counsel within thirty (30) calendar days from the date of the Regional Director's response. Where a valid reason for delay is stated by an inmate these time limits may be extended. Appeal to the Office of General Counsel is the final

administrative appeal in t
Prisons.

§ 542.16 Index and access.

Disposition access.) members of the public access to Administrative dexes and to responses b at the location where tained. Copies, with nar identifiers deleted, may during regular office ho purchased.

PART 543—LEGAL

Subpart A—[Rese

Subpart B—Inmate Leg

Sec.
543.10 Purpose and scope
543.11 Legal research and legal documents.
543.12 Retention of attorn
543.13 Visits by attorneys
543.14 Limitation or de visits and correspondei
543.15 Legal aid program
543.16 Other paralegals, assistants.

Subpart C—Claims Under Claims A

543.30 Purpose and scope.
543.31 Procedures.
543.32 Appreciation and

Subpart A—[Re

Subpart B—Inmate L

AUTHORITY: 5 U.S.C. 30 4042, 4081, 4082, 5015, 5 510; 28 CFR 0.95-0.99.

SOURCE: 44 FR 38263, J otherwise noted.

§ 543.10 Purpose and sco

The Bureau of Pri inmate reasonable acce terials and counsel, and portunity to prepare le The Warden shall es al law library, and proce to legal reference ma legal counsel, and for legal documents.

[46 FR 59509, Dec. 4, 1981]

administrative appeal in the Bureau of Prisons.

§ 542.16 Index and access.

Disposition access. Inmates and members of the public may request access to Administrative Remedy indexes and to responses by case number at the location where they are retained. Copies, with names and other identifiers deleted, may be inspected during regular office hours or may be purchased.

PART 543—LEGAL MATTERS

Subpart A—[Reserved]

Subpart B—Inmate Legal Activities

Sec.
543.10 Purpose and scope.
543.11 Legal research and preparation of legal documents.
543.12 Retention of attorneys.
543.13 Visits by attorneys.
543.14 Limitation or denial of attorney visits and correspondence.
543.15 Legal aid program.
543.16 Other paralegals, clerks, and legal assistants.

Subpart C—Claims Under the Federal Tort Claims Act

543.30 Purpose and scope.
543.31 Procedures.
543.32 Appreciation and depreciation.

Subpart A—[Reserved]

Subpart B—Inmate Legal Activities

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 4082, 5015, 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

SOURCE: 44 FR 38263, June 29, 1979, unless otherwise noted.

§ 543.10 Purpose and scope.

The Bureau of Prisons affords an inmate reasonable access to legal materials and counsel, and reasonable opportunity to prepare legal documents. The Warden shall establish an inmate law library, and procedures for access to legal reference materials and to legal counsel, and for preparation of legal documents.

[46 FR 59509, Dec. 4, 1981]

§ 543.11 Legal research and preparation of legal documents.

(a) The Warden shall make materials in the inmate law library available whenever practical, including evening and weekend hours. The Warden shall allow an inmate a reasonable amount of time, ordinarily during the inmate's leisure time, to do legal research and to prepare legal documents. Where practical, the Warden shall allow preparation of documents in living quarters during an inmate's leisure time.

(b) The Warden shall periodically ensure that materials in each inmate law library are kept intact and that lost or damaged materials are replaced.

(c) Staff shall advise an inmate of rules and local procedures governing use of the inmate law library. Unauthorized possession of library materials by an inmate constitutes a prohibited act, generally warranting disciplinary action (see Part 541 of this chapter).

(d) An inmate may receive or purchase law materials from outside the institution, but the Warden may reject material if there is a compelling reason in the interest of institution security, good order, or discipline. The Warden may limit for housekeeping reasons the amount of legal materials an inmate may accumulate. An inmate may receive hardcover law books from publishers or bookstores. An inmate may receive softcover material (for example, paperback books, newspapers, magazines) from any source. An inmate may receive court or legal documents from court clerks or judges or from his attorney through the mail or incident to visiting. Staff may inspect these documents for contraband but may not read them if properly presented.

(e) An inmate is responsible for submitting his documents to court. Institution staff who are authorized to administer oaths shall be available to provide necessary witnessing of these documents, as requested by inmates and at times scheduled by staff.

(f) Unless the institution has an active, ongoing legal aid program, the Warden shall allow an inmate the assistance of another inmate during

John J. McCarthy /38051-066 pro se
State No; 14163
United States Penitentiary
P.O. BOX 1000
Leavenworth, Kansas., 66048-1000

[Filed April 3, 1990]

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

JOHN J. MCCARTHY /38051-066 State No; 14163 [PLAINTIFF]	:	CIVIL NO: JUDGE:
V.	:	CIVIL RIGHTS COMPLAINT 28 U.S.C. 1331
Hospital Administrator Maddigan Chief Psychologist Dr Perry Dr Walters Dr Delmuro United States Penitentiary Leavenworth, Kansas.,66048-1000 [D. FENDANT'S]	:	"WITH A JURY DEMAND" This Complaint seeks Home; Damages Only.

COMPLAINT

1. JURISDICTION;

1. 28 U. S. C. 1331
2. 18 U. S. C. 4042
3. 18 U. S. C. 5003

2. PARTIES;

a. Plaintiff;

John J. McCarthy /38051-066 (state No; 14163) is a State of Connecticut prisoner held in Federal Custody pursuant to 18 U. S. C. 5003., and Conn. Gen. Statute 18-71. He is above the age of eighteen years and

a tax payer, he is serving sentences for non-violent crimes of Larceny in the first degree cited as State v. McCarthy, 197 CONN 247 (1985)., State v. McCarthy, 197 CONN 166 (1985).

b. Defendant's;

Maddigan/Perry/Walters/Delmuro are all staff at the United States Penitentiary Leavenworth and work under color of United States Law pursuant to Statutes/Regulations/Contracts and Agreements. They are above the age of eighteen years and tax payers. Each are sued in bosth capacities-officially as well as individually.

3. THIS COMPLAINT IS EXEMPT TO THE ADMINISTRATIVE APPEALS EXHAUSTION DOCTRINE

This Complaint seeks "Money Damage Awards Only" therefor is exempt to the administrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 et seq)1/

4. FACTS;

1. The plaintiff is a State prisoner held in Federal Custodypursuant to 18 U.S.C. 5003., Conn. Gen. Statute 18-91 and a "written contract agreement" pursuant to 18 U.S.C. 5003 (a). The Federal Bureau of prisons has a Statutory duty to provide "medical" treetment to the plaintiff pursuant to 18 U.S.C. 5003 (c) and 4042 (2) Id.

2. The Plaintiff has a long history for serious medical needs. A few months ago he experienced a opperation on his spinal collum at the United States Medical Center at Springfield Missouri. The opperation was unsuccessfull and the plaintiff is in pain most of the time. The Plaintiff also has a history for psychatric care and on several occasuions while held in other Federal Penitentiaries was treated with medications because he is unable to cope with stress.

Note; 1/ Presently the Plaintiff is appealing.

3. For several months the Plaintiff on occasion cpmplained to medical staff about his Back pain and requested medication. The only medication that was ever proscribed was insignificant and at times the Plaintiff was forced to purchase contraband drugs. Also the Plaintiff complained to medical staff that because of his back injury and pain problems he is persistently staying up at all hours of the night, he has to lay on the floor and pull on his legs this causes his cellmate to kept up and causes problems between them. The Plaintiff requested a singel cell and staff persistently egnored him.

4. On March 28/1990 the Plaintiff appealed personally to Dr Delmuro for pain medication/a singel cell/stress medication. Dr Delmuro flagerently egnored the plaintiff and told him that if he was not satisifed to see the hospital administrator Defendant Maddigan. The plaintiff then went and saw Defendant Maddigan and explained his situation to him. Defendant Maddigan claimed that he was not a doctor and therefor could not treat the plaintiff and that if he did not like his response to complain to the Warden. 2/

The Plaintiff then went and saw Chief psycholigest Defendant Perry and explained to his that for over a month now he was having these problems and that he had previously seene Defendant Dr Walters complaining of these problems and other problems and that Dr Walters was not going to request a medication untill after the plaintiff seen Dr Delmuro or other hospital staff. The plaintiff informed Dr Perry that he had seen hospital staff and they refused to treat him and that this and related problems were causing stress and violent reactions.

The Plaintiff then went and saw Dr Walters and appealed to him again and Dr Walters claimed that he would not treat the plaintiff.

The Plaintiff then returned and saw Dr Perry explaining the above and Dr Perry attempted to make a joke of the hole situation and laughed.

Note; 2/ The Plaintiff has written the Warden who fails to respond

5. CONCLUSION AND CONSTITUTIONAL VIOLATIONS;

1. The action outlined in FACTS violates the United States Constitution eighth amendment and is in fact deliberate indefference to serious medical needs.

2. The action outlined Id., violates 18 U.S.C. 5003 the "written contract agreement" and 18 U.S.C. 4042 (2) as well as 28 C.F.R. Regulations 0.95 and 0.96.

3. The action of the Defendant's denying to the plaintiff medication for pain and stress causes pain and suffering and violates the Eighth Amendment of the United States Constitution.

6. RELIEF;

Plaintiff seeks "Money Damage Awards Only" in the following amounts and manner;

1. $100.000.00# Compensatory

2. $100.000.00# Punitive

3. $100.000.00# Actual

4. All Costs for this litigation to be taxed to the Defendant's.

5. All damage awards to apply seperately and appear to each and every defendant appart.

6. A Jury Trial on all issues.

7. VARIFICATION;

I swear and state under penalty of purjury and the law that the forgoing is true and correct; Executed on day month, 1990 By The Plaintiff;

John J. McCarthy #38051-066 (state No; 14163)

I swear and state the forgoing to be true and correct ; Executed; day month 1990 By The Plaintiff;

John J. McCarthy #38051-066 (state no; 14163)

Supreme Court of the United States

No. A-434

John J. McCarthy,

Petitioner

v.

Mr. Maddigan, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 18, 1991.

/s/Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 7th day of December, 1990.

ORIGINAL

No. 90-6861

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN J. McCARTHY, PETITIONER

v.

MR. MADDIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTION PRESENTED

Whether a federal prisoner seeking money damages must exhaust the administrative remedies provided by the Bureau of Prisons before filing a federal court action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI
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FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is reported at 914 F.2d 1411. The orders of the district court (Pet. App. 4a-5a and 6a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990. On December 7, 1990, Justice White extended the time in which to file a petition for a writ of certiorari until January 18, 1991, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a prisoner at the federal penitentiary in Leavenworth, Kansas, filed a pro se complaint in the United States District Court for the District of Kansas pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Claiming that the medical staff at Leavenworth would not give him the particular drugs he demanded for pain and stress, petitioner sought $300,000 in actual, compensatory, and punitive damages.

Petitioner's complaint alleged that a few months after undergoing back surgery he was experiencing pain "most of the time." Pet. App. 12a. The medical staff at Leavenworth had provided him with medication to treat the pain, petitioner said, but this medication was "insignificant." Id. at 13a. Petitioner alleged that the medical staff refused to provide him with the drugs of his choice and that, as a consequence, "at times" petitioner "was forced to purchase contraband drugs." Ibid. Petitioner also claimed that he had a "long history" of serious medical needs and of psychiatric care and that he had received medication in the past "because he is unable to cope with stress." Id. at 12a. Petitioner alleged that the medical staff at Leavenworth exhibited "deliberate indifference" to his "serious medical needs" by failing to prescribe the medication he requested, in violation of his Eighth Amendment rights. Id. at 14a.

The district court dismissed petitioner's complaint without prejudice because he had failed to exhaust his administrative

remedies as required by Brice v. Day, 609 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).[1] Pet. App. 4a-5a. In support of its ruling, the district court stated that the "administrative remedy process is necessary for the proper and effective hand[l]ing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." Id. at 4a.

The court of appeals affirmed. Pet. App. 1a-3a. The court held that its decision in Brice v. Day required a federal prisoner to exhaust administrative remedies before bringing a Bivens action, no matter what type of relief was sought. "Brice made clear," the court stated (id. at 2a), that "'administrative consideration is not to resolve constitutional issues nor to consider damages' * * * but simply to develop a factual record to assist the district court in its review." The court of appeals recognized (ibid.) the decisions of the Third Circuit in Muhammad v. Carlson, 739 F.2d 122 (1984), and of the Sixth Circuit in Goar v. Civiletti, 688 F.2d 27 (1982), holding that the federal prisoner plaintiffs in those cases were not required to exhaust their administrative remedies before bringing Bivens claims limited to money damages, but it declined to alter its own exhaustion rule. The court noted its agreement with the Fifth Circuit, which had concluded that "'a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their * * * treatment during confinement.'" Pet. App.

[1] The administrative remedy in question is that set forth by the Bureau of Prisons in 28 C.F.R. 542.10-542.16.

2a, quoting Hessbrook v. Lennon, 777 F.2d 999, 1007 (5th Cir. 1985). The court of appeals reasoned that because Bivens actions are a "'creation of the judiciary' * * * it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions." Pet. App. 2a.[2]

ARGUMENT

Petitioner contends that because he is seeking money damages only, the court of appeals erred by requiring him to exhaust administrative remedies. In addition, he maintains that the court of appeals' decision conflicts with decisions of the Third and Sixth Circuits and that this Court should resolve that conflict. We disagree. In our view, the court of appeals correctly decided to require petitioner to exhaust his administrative remedies. And while we recognize the existence of disagreement among the circuits, we believe that review by this Court is not warranted at this time.

1. The court of appeals properly held that federal prisoners must exhaust their administrative remedies before pursuing a Bivens action. Ordinarily, a party is required to exhaust administrative remedies before seeking relief in the federal courts. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The exhaustion requirement does not preclude judicial relief, but

[2] We have been informed by the Bureau of Prisons that, while his appeal was pending, petitioner filed a number of grievances complaining about the medical treatment he was receiving. His most recent grievance was denied by the warden on March 6, 1991. Petitioner appealed the warden's decision to the Regional Director of the Bureau of Prisons on March 9, 1991.

simply postpones the timing of a judicial determination, Muhammad v. Carlson, 739 F.2d at 124, while establishing a record of the positions of the parties. "[A]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, 193 (1969).

"In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress." Patsy v. Florida Board of Regents, 457 U.S. 496, 502 n.4 (1982). Congress has authorized the Bureau of Prisons to manage and regulate all federal correctional institutions, to provide for prison discipline, and to review, investigate, and respond to prisoner complaints. See 18 U.S.C. 4001 and 4042. Plainly, the Bureau of Prisons, and not the federal judiciary, has primary responsibility for federal prisoners. While the courts must, of course, ensure that the Bureau conducts its affairs in accordance with the requirements of the Constitution, the courts should also be careful not to undermine prison discipline by providing "tickets to an immediate confrontation with the guards and supervisors outside the prison and in the court room." Brice v. Day, 604 F.2d at 667.

In 42 U.S.C. 1997e, Congress sought to foster a system of state administrative remedies for adult prisoners -- a system that those prisoners would be required to exhaust before bringing actions

against state officials under 42 U.S.C. 1983. Congress's purpose in enacting Section 1997e was to encourage the resolution of prison problems by prison administrators, to reduce a backlog of prisoner Section 1983 cases that was "swamping" the federal district courts, to resolve some cases, and to help frame the issues in the remaining cases in order to make them ready for expeditious court consideration. S. Rep. No. 96-416, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Admin. News, 787, 816. Congress has also imposed an exhaustion requirement on federal prisoners who seek damages under the Federal Torts Claim Act (FTCA). See 28 U.S.C. 2672, 2675.

Bivens actions are a "creation of the judiciary." Pet. App. 2a. "A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task." Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring). Since this Court has "fashion[ed] for itself a legislative role" by recognizing prisoner Bivens actions (id. at 35 (Rehnquist, J., dissenting)), the federal courts should follow through by establishing rules to govern and channel those actions. Just as Congress has fostered exhaustion requirements for state prisoners bringing Section 1983 actions and imposed such requirements for federal prisoners bringing FTCA actions, the federal courts should require federal prisoners bringing Bivens actions to exhaust the relevant administrative remedies.

As the court below recognized in its earlier decision in Brice v. Day, requiring a prisoner to exhaust administrative remedies

before bringing a Bivens action provides many benefits associated with prior administrative consideration, such as filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute.[3] In addition, an exhaustion rule applied to Bivens actions helps reduce the intrusion of the courts into prison administration, promotes judicial efficiency, encourages the resolution of problems by prison administrators, and prevents the circumvention of established procedures.[4]

This case illustrates the benefits of an exhaustion rule. Requiring a prisoner who complains about his medical treatment to exhaust his administrative remedies by filing a complaint with the Bureau of Prisons would be likely to create a record providing

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[3] Petitioner states (Pet. 14) that it is not clear from the regulations that prison officials prepare a written response to prisoner grievances. However, Federal Prison System Program Statement 1330.7 at p.3 (1979) makes clear that "[r]esponses shall be in writing." That requirement is reflected in the regulations, which provide that inmates and members of the public must have access to the responses and to an index describing the grievances. 28 C.F.R. 542.12.

[4] Petitioner notes (Pet. 10) that the regulations do not provide for the consideration of "tort claims," see 28 C.F.R. 542.12, and suggests that his claim "is categorically excluded from being heard under the regulations." But the regulations provide for the consideration of "a complaint which relates to any aspect of [the complainant's] imprisonment if less formal procedures have not resolved the matter." 28 C.F.R. 542.10. Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated by prison medical personnel and would be able to provide various forms of relief -- including the provision of alternative medical treatment -- even though they are not authorized to award money damages in such cases. In fact, as noted above, petitioner has filed a number of grievances complaining about his medical treatment since the district court dismissed his Bivens action, and the warden has responded to each complaint.

background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints. Furthermore, the filing of such a complaint with the Bureau of Prisons would not only assist the district court if a Bivens suit is ultimately brought, it might serve to conciliate or resolve the underlying issues and thus render a Bivens action unnecessary. Thus, the court of appeals acted reasonably in upholding a requirement of exhaustion.

In this case, the district court dismissed petitioner's Bivens action without prejudice for failure to exhaust administrative remedies. Other courts agree that dismissal without prejudice is warranted in cases like this. Davis v. Keohane, 835 F.2d 1147, 1149 (6th Cir. 1987); Veteto v. Miller, 794 F.2d 98, 100 (3d Cir. 1986). Therefore, petitioner will be able to refile his Bivens action, if he desires, as soon as his most recent grievance is decided. At that time, he will have exhausted his administrative remedies, and the district court will have the benefit of the record that has been compiled.

2. The disagreement in the circuits does not, in our view, warrant this Court's attention. As an initial matter, the courts of appeals agree that exhaustion must be required in some circumstances before a prisoner may bring a Bivens action. Thus, like the court below, the Third Circuit requires the exhaustion of administrative remedies when a federal prisoner seeks injunctive relief as well as money damages. Veteto v. Miller; Waddell v.

Alldredge, 480 F.2d 1078 (1973). Similarly, in Davis v. Keohane, 835 F.2d at 1149, the Sixth Circuit required exhaustion because the prisoner had not "clearly shown that exhaustion would be * * * unable to afford him the relief he requests."

Those two circuits, however, have allowed federal prisoners to proceed directly to court in certain circumstances. In Muhammad v. Carlson, the Third Circuit held that "[b]ecause a prisoner asserting only a claim for damages under Bivens apparently can obtain no relief from the Bureau of Prisons, it would serve little purpose to require him to exhaust administrative remedies before coming into the courts." 739 F.2d at 125. The court distinguished cases such as Brice v. Day, where "the prisoner is seeking more than money damages." Id. at 125 n.1. Similarly, in Goar v. Civiletti the Sixth Circuit excused a federal prisoner from exhausting administrative remedies where the prisoner sought damages only and "the alleged tortious acts were not continuing." 688 F.2d at 29. The court distinguished Brice v. Day by stating that prison administrators might have been able to cure the overcrowded conditions forming the basis of the complaint in that case, but could not remedy the damage from the assault forming the basis of the claim in Goar. Ibid.[5]

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[5] The Seventh Circuit has considered whether exhaustion of administrative remedies should be required in Bivens cases, but has not adopted a position on the issue. In Greene v. Meese, 875 F.2d 639, 643 (1989), the court suggested that "[w]hether complete exhaustion of Bureau of Prison remedies should be required even in cases where the prisoner is also seeking damages, a remedy not found in the Bureau's arsenal, may depend on what the damages are being sought for." The court added that, in certain cases, "[u]nless exhaustion is required prisoners will have an incentive to bypass the administrative procedures * * * by suing for damages and raising the identical issues in such suits that they would have raised in a complaint to the Bureau of Prisons if they had filed one." Ibid.

Thus, for certain Bivens actions the Third and Sixth Circuits permit district court consideration without requiring a prisoner to exhaust his administrative remedies. However, it appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice.[6] In the present case, although plaintiff seeks only damages (perhaps in an effort to avoid any exhaustion requirement[7]), it appears from his complaint (Pet. App. 11a-14a) that he suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff. That is confirmed by the grievances that petitioner has filed in the last year complaining about his medical treatment. See note 2, supra. Therefore, any Eighth Amendment violation arising out of this situation appears likely to continue absent a change in the ongoing medical treatment afforded to this

---

[6] No continuing prison practice was at issue in Goar, where the prisoner complained that he had been injured by an assault by another inmate. 688 F.2d at 28. In Muhammad, the prisoner made two unrelated claims. One of the claims -- based on the prisoner's placement in administrative detention for seven days -- clearly had no ongoing significance. 739 F.2d at 123. The other claim was based on the denial of medical treatment for a back injury; there was no indication in the court's opinion whether the problem was ongoing. Ibid.

[7] Petitioner alleged that "[t]his Complaint seeks 'Money Damage Awards Only' therefor is exempt to the adminstrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 et seq.)." Pet. App. 12a. He added, in a footnote to the complaint, "Presently the Plaintiff is appealing." Ibid. Thus, it seems clear that petitioner intended to split off his damage claim and pursue it in court while simultaneously seeking other relief for the same problem through administrative channels.

prisoner by the prison medical staff. It is thus not clear on these facts whether any court of appeals would forgive petitioner's failure to exhaust administrative remedies.

In any event, it may be that a uniform rule with respect to exhaustion is not required. One court recently noted that the federal courts are being "flooded by prisoner litigation." Del Raine v. Carlson, 826 F.2d 698, 702 (7th Cir. 1987). Circuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion of the Bureau of Prison's administrative remedies. Other circuits may fairly conclude that it is more efficient to handle Bivens actions with the benefit of preliminary fact-finding by the Bureau of Prisons. It is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN J. MCCARTHY PETITIONER	)	
V	)	NO. 90-6861
MR. MADDIGAN, ET AL.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE RESPONDENTS IN OPPOSITION by mail on March 27, 1991.

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March 27, 1991

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No. 6861

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-6861

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Respondents, in their brief, acknowledge the clear conflict among the circuits over whether a federal prisoner must exhaust administrative remedies before bringing a Bivens action seeking only damages. In light of that acknowledgement, their arguments against review, like their efforts to defend the Tenth Circuit's ruling on the merits, are unavailing.

1. While recognizing the basic conflict cited by petitioner,[1] respondents nevertheless oppose review for three reasons. First, they observe that the courts of appeals do not disagree about an issue that is not presented in this case -- i.e., whether a federal prisoner who seeks both injunctive relief and damages must exhaust administrative remedies. Br. in Opp. 8-9. Whatever the validity of that observation, see Pet. 7 n.4, it simply has no bearing on whether the Court should grant the petition in this case.

Second, respondents suggest that conflicting decisions in the Third and Sixth Circuits are distinguishable because in those cases the prisoners were not complaining about "continuing prison practice[s]." See Br. in Opp. 10-11 & n.6 (citing Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982)); see also id. at 10 ("[I]t appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice."). In drawing this purported distinction, however, respondents have had to rewrite the decisions they try to reconcile with the ruling below. As the Tenth Circuit in this case recognized, Goar, Muhammad, and the many cases following them, see Pet. 8 n.6, focus solely on the type of relief sought by the prisoner. See Pet. App. 2a (Goar and Muhammed "hold that a federal prisoner seeking only

1 Notably, respondents do not even address the clear subsidiary conflict between the ruling below and the Fifth Circuit's Hessbrook decision over which administrative remedies must be exhausted by federal prisoners prior to bringing a Bivens action. See Pet. 10 n.7. However, they do apparently reject the Hessbrook rule -- previously supported by the Solicitor General -- that a federal prisoner bringing a Bivens action must exhaust the separate FTCA administative procedures. Compare Br. in Opp. 3 n.1 ("The administrative remedy in question is that set forth . . . in 28 C.F.R. 542.10-542.16."), with Br. for the United States in Opp., Prows v. Black (No. 88-6970), at 6-7.

money damages in a Bivens-type action need not first exhaust administrative remedies"). There is no basis for thinking that the Third and Sixth Circuits would require exhaustion in a pure damages case if the problem underlying the complaint appeared to be continuing or recurrent.

In any event, respondents' effort to treat this case as turning on a "continuing prison practice," Br. in Opp. 10-11, is unavailing -- first, because nothing in the decision below relies on such a characterization; and second, because the characterization is wrong. Relying on materials that are neither in the record nor properly the subject of judicial notice (since they are "subject to reasonable dispute," Fed. R. Evid. 201(b)), respondents assert that petitioner has filed a number of independent administrative grievances involving unspecified "medical treatment he was receiving." Br. in Opp. 4 n.2. Even if true, however, this assertion does not change the fact that in this case, petitioner complained only about one specific problem with medical care and sought only damages as relief.[2] Moreover, respondents neglect to note that, last month, petitioner was transferred out of the penitentiary at Leavenworth to another federal facility. That development extinguishes any possibility

---

2 To the extent that respondents' "continuing conditions" argument attempts to extend petitioner's claim backward in time, it also rests on a misreading of petitioner's complaint. Compare Br. in Opp. 10 (contending that petitioner, in his complaint, alleges that he "suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff") with Pet. App. 12a-13a (the actual complaint, which focused on denial of adequate medical care over a period of several months following a recent back operation).

that the prison grievance procedure could now address any issue of "ongoing" care at Leavenworth raised implicitly by petitioner's lawsuit.

As a third and final argument against review, respondents suggest that "a uniform rule with respect to exhaustion is not required." Id. at 11. Explaining that "[c]ircuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion," respondents conclude that "[i]t is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures." Ibid.

This argument is meritless. To begin with, respondents fail to provide any references to case law, or even any statistics, supporting the idea that the circuits have divided on the basis of their relative resources or case loads. More importantly, it makes no sense to advocate a rule requiring exhaustion of the Bureau of Prisons' (BOP) grievance procedure in some jurisdictions but not in others. That procedure, after all, is set forth in a nationally applicable regulation and provides in all cases for a final appeal to the same official -- the Bureau's General Counsel. See Pet. App. 9a-10a (28 C.F.R. § 542.15). If a prisoner is seeking only damages, exhaustion will be equally beneficial, or futile, regardless of his prison's particular location. Finally, tolerance of continued intercircuit disarray on this issue will create enormous uncertainties for prisoners in circuits that have not yet spoken. In seeking to vindicate their constitutional rights, they will be

forced to guess about which rule will ultimately be applied to them.

2. On the merits of the exhaustion issue, respondents concede that the BOP's administrative grievance procedure does not allow for an award of damages, the only type of relief sought by petitioner. See Br. in Opp. 7 n.4. They nonetheless maintain that the decision below is correct because exhaustion of BOP remedies may achieve certain salutary effects, including "filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute." Id. at 7.

Without delving much further into the merits at this stage, we would simply note that respondents' arguments in this regard are deeply flawed. To begin with, as we noted in our petition, see Pet. 10, the BOP grievance procedure flatly excludes consideration of inmate "tort claims." Pet. App. 9a (28 C.F.R. § 542.12). Respondents seek to avoid this problem by pointing to an earlier general section in the regulations allowing an inmate to "seek formal review of a complaint which relates to any aspect of his imprisonment." Pet. App. 8a (28 C.F.R. § 542.10); see Br. in Opp. 7 n.4. But even respondents do not appear to contend that this general section authorizes consideration of a complaint that is a pure tort claim -- i.e., one that seeks only monetary compensation for past conduct.[3]

3 See Br. in Opp. 7 n.4 ("Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated . . . .") (emphasis added).

Thus, respondents' argument that petitioner's grievance would have been entertained in the administrative process depends on their own unsupported characterization of the grievance as one seeking to forestall ongoing mistreatment.

Even if the BOP would entertain petitioner's tort claim, respondents are simply incorrect in predicting that exhaustion would "provide[] many benefits associated with prior administrative consideration." Br. in Opp. 7. First, as we noted in our petition, respondents vastly overstate the value of any paper "record" likely to be compiled through the BOP grievance procedure. Pet. 14-15. Nor is it an answer to point out, as respondents do, that an internal BOP policy statement requires prison officials to respond "in writing" to grievances. Br. in Opp. 7 n.3. Presumably that requirement would be satisfied by sending the grievant a letter stating simply, "Your grievance is denied."[4]

Second, even if the BOP grievance procedure were to produce "a record providing background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints," id. at 7-8, it would be an abdication of

4 Respondents' related suggestion that the grievance procedure will provide useful "discovery" should be rejected out of hand. Br. in Opp. 7-8; see also Pet. App. 4a. Given the absence of formal mechanisms capable of creating a useful record, it is unlikely that the BOP's procedure will in fact yield any detailed new information. More fundamentally, respondents have cited no authority suggesting that it is appropriate to adopt an exhaustion requirement for the purpose of expanding the discovery provisions of the Federal Rules of Civil Procedure.

judicial duty for a court to rely on such a record in deciding, for example, to dismiss a prisoner's complaint as frivolous under 28 U.S.C. § 1915(d). Third, respondents are wrong in suggesting that the BOP's administrative remedies might "serve to conciliate or resolve" petitioner's claims. Br. in Opp. 8. Since petitioner's complaint sought only damages, and respondents concede that the grievance procedure does not allow for the award of monetary relief, id. at 7 n.4, there is no way that the grievance procedure could have "resolved" anything.[5]

As these factors make clear, it simply makes no sense to require a prisoner who seeks only damages to exhaust the BOP administrative process. Such a requirement entails not only delay in the vindiction of constitutional rights but the real possibility of forfeiture of a valid claim. See Pet. 13-14. And it serves no valid purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

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5 Respondents suggest that Congress would favor exhaustion here, citing the statutory provisions governing exhaustion in section 1983 actions by state prisoners. See Br. in Opp. 5-6. But as we explained in our petition, Congress has authorized states to avoid the nonexhaustion rule of Patsy v. Board of Regents, 457 U.S. 496 (1982), only where the state enacts an administrative grievance procedure that offers to state prisoners, among other things, "plain, speedy, and effective administrative remedies." 42 U.S.C. § 1997e(a)(1) (emphasis added). See Pet. 16-18. Because the BOP's administrative remedies would fail that test -- a point not disputed by respondents -- requiring federal prisoners to exhaust those remedies would run afoul of the available congressional intent on the issue presented by this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the bar of this Court, I hereby certify that one copy of the Reply Brief for Petitioner in McCarthy v. Maddigan, No. 90-6861, was served by first-class mail, postage prepaid, this 4th day of April, 1991, on the following:

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Mr. William Gullickson
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RE: McCarthy v. Maddigan, et al., No. 90-6861

Dear Mr. Gullickson:

In accordance with our telephone conversation earlier today, I have enclosed for filing, pursuant to Supreme Court Rules 15.6 and 39, an original and 10 copies of the Reply Brief for Petitioner in support of the petition for a writ of certiorari in the above-captioned case. A certificate of service is also enclosed.

Sincerely,

Alan E. Untereiner

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